IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 563 OF 2020

BETWEEN

PAUL NHIGULA.....APPLICANT

VERSUS

AZANIA BANK LTD.....RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The applicant has moved this court under the provisions of Section 91(1),(a)(b), (2)(a),(b) and 94(1)(b)(i) of the Employment and Labour Relations Act [Cap 366 R.E. 2019] ("ELRA") and Rule 24(1) & (2)(a)(b),(c),(d),(e),(f), (3)(a),(b),(c),(d), 28(1)(c),(d) & (e) of the Labour Court Rules, G.N. No. 106 of 2007 ("the Rules"). He is seeking for orders that:

(i) The Honourable Court be pleased to revise and quash Arbitration proceedings and award issued by Hon. G.M. Wilbard (Arbitrator) in the Commission for Mediation and Arbitration on 19/11/2020 in Labour Dispute No. CMA/DSM/UBG/19/19/17.

(ii) The Honourable Court may, having quashed the Arbitral Award and determine the matter in the manner it considers appropriate.

(iii) Any other relief that the Honourable Court may deem fit and equitable to grant.

The application was supported by an affidavit deponed by the applicant on 28th December, 2020. Brief background of the matter as per the gathered facts dates the dispute back to the 02nd February, 2015 when the Applicant was employed by the respondent herein on permanent basis in the position of branch Operation Grade III at Simiyu office. The applicant was later transferred to the post of Relationship Officer in the Department of Business Development (Corporate Banking) in Dar-es-salaam on 16th August, 2017 and was there until he was terminated on 21/01/2019 (Annexture PN -1).

On 10/12/2018 when the applicant was on his official duties attending training session (Agri-Business Training), he received a call from his Departmental Director who instructed him to meet somewhere with the Director. He was later charged with criminal and disciplinary offence and he was supposed to represent his defence within seven days, in which the

applicant complied with the same. Unsatisfied with the action of the respondent, the applicant decided to file labour disputes with reference number CMA/DSM/UBG/19/19/17 ("the Dispute") before the Commission for Meditation and Arbitration and on 19th November, 2020 the Hon. G.M. Wilbard (Arbitrator), decided that the termination of the applicant was fair both substantively and procedurally. Further unsatisfied, the applicant decided to filed this application for revision praying for the court to revise the decision of the CMA and determine the matter in the manner it considers appropriate. In his affidavit in support of the Chamber Summons, he raised the following legal issues:

1. Whether, the Hon. Arbitrator erred in Law and Facts for considering that the reasons for termination was fair.
2. Whether the Hon. Arbitrator erred in Law and Facts for determining that the procedure for termination was fair.

I will start with the fairness of the substantive part of the termination. It was Mr. Hemedi's submissions started by citing the provisions of Section 37(5) of the ELRA which provides that:

"No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto."

He then submitted that the reasons for the termination of the applicant are seen on Annexure A-4 to the affidavit. That there were 3 reasons for the termination, the first one is "assist or collude with others to steal TZS 233,222,5000/- from account No. 002002005450370001 at Azania Bank Limited Kariakoo". The second count was "attempt to steal money from account of Pius Malifedha and Samwel Otieno Airo" and the third count is "disclosure or convey of confidential information to unauthorized person". He then argued that for these offences when they happen at work place, the procedure is that a proper investigation is conducted by the police force so as to find the truth on the allegations identified. He referred to Section 102(1) of the ELRA which provides that:

"A District Court and a Resident Magistrate's Court have jurisdiction to impose a penalty for an offence under this Act."

He then submitted that disciplinary offences which are connected to stealing have to be heard by the District Court or Resident Magistrates' Courts when it is found that the offences were committed under the ELRA. He argued that the procedure is clearly set by the law and in this case the respondent reported the matter to police and the exhibit that was taken to police is contained in Annexute A7-collectively. That since it is clear that the respondent reported the matter to the police, then it was necessary for the police report to be issued and the accused be arraigned in court so that the court can make a decision on who is to be punished. After the Court decision is made, that is when the reason for termination can be said to be fair. He supported his submission by citing the case of **Iddi Rajabu Mgala Vs. Tanzanite One Mining Ltd, Revision No. 48/2013** whereby Hon Aboud, J. held on page 18:

> *"No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantial until final determination of the court or subsequent appeal thereto."*

Mr. Hemedi pointed out that in the cited decision, the court considered the requirement of the law with regard to the offences of misconduct that the employer will not be able to take any steps until the decision of the court is final. He further cited the case of Edward Lugayaza Vs. Capdecor, Labor Execution No. 100/2010 where Hon Moshi, J held on page 8:

"Forgery is a criminal offence, there are other laws which provide procedures for that offence so this is not a proper forum".

He submitted that the decision of Judge Moshi is that the Criminal Offences must go through police and Courts and that is when the employer may prove those offences. That because it has been said that there was a loss of money, Tshs. 233 million which explained that the complainant was involved, then Section 374 of the Criminal Procedure Act talks of conspiring, being involved in an offence, conspiracy may not be proved if there are no sufficient exhibits that involves both sides. he submitted further that during disciplinary hearing, there were no those equipment's that were used for communication like telephone conversations from the applicant and the other accused. That the person called Noah Mwakalogo, Joshua Mollel, Yusuph Baha and Fitnus Mlelwa who was mentioned to have

owned the alleged account at Azania Branch, were not called in the disciplinary meeting.

In reply, Mr. Mbaga who represented the respondent, submitted that there was a valid reason for termination arguing that reading Rule 9(4) of the Employment and Labour Relations (Code of Good Practise) G.N. No. 42/2007 ("the Code"), there are three aspects which talk of situations where the employer may terminate the employee which are conduct, capacity, compatibility and employer's operational requirements. But in this, Mr. Mbaga concentrated on the issue of conduct. He then submitted that the respondent is a banking institution which high integrity, secrecy and good conduct of individual employees is its key factors because they deal with money and reserves of different clients.

He went on submitting that the applicant signed an employment contract (EX-A1-Aneex ABL1) and in the said exhibit, it requires the employee to follow the laws of the country, banking services regulations and applicable policies of the bank (pg 5 clause 9 of EXA1). Further that the respondent signed a form which requires him to maintain confidentiality on customer information of the customers that he served and those he could access in bank systems. He argued that reading clause

7(b)(d)&(e) and clause 8(3)(a) of the EXA9, these are disciplinary matters and procedure and Azania Bank Human Resource Policy explain clearly that when you contravene the rules and regulations, dishonesty and breach of trust, the disciplinary measure is termination. That the applicant in this court know exactly that they committed a mistake while in employment and the reasons for termination were correct, something which is reflected in the CMA award.

On the issue that there was a police case pending when the applicant was terminated, Mr. Mbaga brought to the attention of this court that this document was never tendered at the CMA, it is just brought here. He then pointed out that even if the court decided to consider the letter, on para 3 of the letter, these words appear:

"tutaendelea kukujulisha kadri upelelezi utakavyokuwa unaendelea".

He argued that the letter means that the investigation is incomplete hence no charge was lodged in court against the applicant. They are just allegations and there is no court case.

On the provisions of Section 102(1) of the ELRA, that the matter should be decided by a D/Court of RM/Court, Mr. Mbaga submitted that the

respondent is a complete well-established legal entity and have her procedures on how to deal with any allegations or accusations. That the procedures were conducted and they are legally established procedures. He submitted further that the relationship between the employer and employee in this case had been broken and the respondent had no faith or confidence with the applicant. Leaving the applicant on employment could have caused worse consequences and could call for the applicant to be interrogated by the regulator who is the Bank of Tanzania. That the offence had been reported to police and the respondent bank and it was known within, that is why the respondent had to proceed with disciplinary actions against the applicant.

On the cases referred by the applicant, starting with the case of **Iddi Rajabu Vs. Tanzanite One**, Mr. Mbaga argued that the situation is different because in that case there was a criminal case and the judgment came out and the employee took the judgment to his employer but the employer proceeded to terminate his employment. That looking at this situation and the case at hand, there is no charge sheet brought to court or case number that is mentioned in this court neither is there a judgment thereto. That is why we say it is distinguishable. On the other case of

Edward Vs Capidor, he submitted that the case is different because in that case, the offence is forgery and the conclusion of the case was that it was dismissed. That in this case, the applicant conducted breach of trust through collusion, disclosing and conveying confidential matter to third party which is against the procedures and regulations of the respondent.

On the allegation that the witnesses of the loss incurred were not brought to the committee, Mr. Mbaga submitted that if the court go through EXA11 which is the disciplinary proceeding, it is also showing that customer statement was issued, this is the customer whose money was stolen in the account after the applicant conveyed information to people who had ill intention and executed the theft. That page 3-4 of the exhibit shows that there were no witnesses and the applicant was accorded right to question those witnesses regarding to what the witnesses had testified.

As for the case of **Leopard Tours VS. Rashidi Juma**, Mr. Mbaga also distinguished it because termination of the employees there was oral after they were absent for 2 weeks without notice to the employer. That in this case, the applicant was suspended with pay and was accorded an opportunity to be heard. Further that he was granted right to have a representative and bring evidence and also, he was accorded a right to

appeal so if he needed to call witnesses and was entitled to demand production of certain witnesses and he did not exercise this right. On those submissions, his conclusion was that the substance of termination was fair.

In rejoinder, Mr. Hemedi submitted that the investigation was conducted at their intelligence department and police and that in conducting criminal offences, the investigation must be conducted by police and the advocate did not prove that there was the police report as alleged.

On the fairness of the reasons, that the respondent had committed an offence, he argued that this statement has the effect of convicting the applicant, something which was not proved by any court therefore the allegations of the employer in terminating the employee were not founded. As for the police letter referred to, he argued that this is a government document and in admitting that, the director was informed that when investigation will be complete they will be informed proves that the allegations were reported to police and till now there is no police report concluding the involvement of the applicant in the allegations.

Having considered the parties' submissions, I find it just that I start to determine the argument raised by Mr. Hemedi that that disciplinary

offences which are connected to stealing have to be heard by the District Court or Resident Magistrates' Courts when it is found that the offences were committed under the ELRA. He cited the provisions of Section 2(1) of the ELRA which provides that:

"A District Court and a Resident Magistrate's Court have jurisdiction to impose a penalty for an offence under this Act."

His argument was that the procedure is clearly set by the law and in this case the respondent reported the matter to police and the exhibit that was taken to police is contained in Annexure A7-collectively, since the respondent reported the matter to the police, then it was necessary for the police report to be issued and the accused be arraigned in court so that the court can make a decision on who is to be punished. After the Court decision is made, that is when the reason for termination can be said to be fair, supporting his argument by citing the case of **Iddi Rajabu Mgala Vs. Tanzanite One Mining Ltd, Revision No. 48/2013**. It is obvious that Mr. Hemedi has misconceived the interpretation of the Section 102(1) that he cited. This is evidenced by the fact that he did not read the Section 102 in its totality in order to find which offences are triable by the District Magistrate under the ELRA; otherwise he would not have come up with

such an argument. For the interest of justice, I will reproduce the whole of the Section 102 of the ELRA:

"(1) A District Court and a Resident Magistrate's Court have jurisdiction to impose a penalty for an offence under this Act.

(2) Any person convicted of any of the offences referred to in sections5 and 6, may be sentenced to-

(a) a fine not exceeding five million shillings;

(b) imprisonment for a term of one year; or (c) both such fine and imprisonment.

(3) Any person convicted of any of the offences referred to in sections7, 8 and 9 may be sentenced to a fine not exceeding five million shillings.

(4) Any person convicted of any of the offences referred to in sections27, 28, 45(3) and 101 shall be sentenced to a fine not exceeding one million shillings."

Under the cited Section, it is clear that the offences which may be tried by the District Court are those falling under the provisions of Sections 5, 6, 7, 8, 9, 27, 28, 45(3) and 101 of the ELRA. Again the relevant Sections and sub0-sections are produced:

Section 5:

5.-(1) No person shall employ a child under the age of fourteen years.

Sub-Section 7 of the same Section provides:

"It is an offence for any person- (a) to employ a child in contravention of this section; (b) to procure a child for employment in contravention of this section."

Going to Section 6, the offences provided therefore are:

"6.-(1) Any person who procures, demands or imposes forced labour, commits an offence.

Further to that, Section 7 also provides for offences triable by the District Magistrate:

"Section 7 (7) Any person who contravenes the provisions of subsections (4) and (5), commits an offence.

(4) No employer shall discriminate, directly or indirectly, against an employee, in any employment policy or practice, on any of the following grounds:

(a) colour;

(b) nationality;

(c) tribe or place of origin;

(d) race;

(e) national extraction;

(f) social origin;

(g) political opinion or religion;

(h) sex;

(i) gender;

(j) pregnancy;

(k) marital status or family responsibility;

(l) disability;

(m) HIV/Aids;

(n) age; or

(o) station of life.

(5) Harassment of an employee shall be a form of discrimination and shall be prohibited on any one, or combination, of the grounds prescribed in subsection (4)."

There is also offence against a trade union provided for under Section 8 hereunder:

"8.-(1) No trade union or employers' association shall discriminate, directly or indirectly, against any of the grounds prescribed in subsection (4) of section 7-

(2) Any person who contravenes the provisions of subsection (1), commits an offence."

There is also an offence of discrimination provided for under Section 9(3)&(4):

"9(3) No person shall discriminate against an employee on the grounds that the employee-

(a) exercises or has exercised any right under this Act or any other written law administered by the Minister;

(b) belongs to or has belonged to a trade union; or

(c) participates or has participated in the lawful activities of a trade union.

(4) No person shall discriminate against an official of an office bearer of a trade union or federation for representing it or participating in its lawful activities.

(5) Any person who contravenes the provisions of subsections (3) and (4), commits an offence."

Section 28 of the same prohibits employers to make deduction unless the conditions set down under subsection 28(1)(a)&(b) are fulfilled. The Section provides:

"28 (1) An employer shall not make any deduction from an employee's remuneration unless—

(a) the deduction is required or permitted under a written law, collective agreement, wage determination, court order or arbitration award; or

(b) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt."

Subsection 7 of Section provides that any person who contravenes the provisions of the section 28 commits an offence.

Section 27 also provides for an offence on the employer's failure to pay monetary remuneration that the employee is entitled to, the offence is created under sub Section 5 of the said Section. The relevant provisions provide:

27.-(1) An employer shall pay to an employee any monetary remuneration to which the employee is entitled-

(5) Any employer who contravenes the provisions of this section, commits an offence.

There is also an offence against a non-registered trade union provided for under Section 45(3) of the ELRA:

"45(3) (3) It is an offence for a trade union or employer's association to operate as a union or association-

(a) after 6 months have expired of its establishment if it has not applied for registration under this Part; or

(b) unless it is registered under this Part."

Lastly, there is an offence against disclosure of confidential information under Section 101(1) of the ELRA:

"101.-(1)Subject to the provisions of subsection (2), it is an offence for any person to disclose any information relating to the financial or business affairs of another person if that information was acquired in the performance of any function or the exercise of any power under this Act."

I have decided to reproduce the Sections so that the applicant can have a clear understanding of those offences which confer jurisdiction of the District Court to try them under the Act. It must be borne in mind that it is only those offences that the District Court has jurisdiction to determine and no other offences under the employment laws. The argument that the investigation should have been done by police and proved by conviction is by all means misconceived. The very sound of it will defeat the whole purpose of establishing labor law regime for the purpose of expeditious disposal of labor disputes and complaints, that is why Rule 11(1)(2)&(3) of the Code emphasizes the employers to develop their own disciplinary procedures as it provides:

"11.-(1) All employers shall implement disciplinary policies and procedures that establish the standard of conduct required of their employees.

(2) The form and content of policies and procedures shall obviously vary according to the size and nature of the employer's business.

(3) An employer's rules in the application of discipline and standards of conduct shall be made available to the employees in a manner that is easily understood"

The question here is whether the applicant was aware of those policies and procedures, something which I did not find to be at issue during arbitration, the conclusion is therefore the applicant was aware of those policies and procedures. More so, Mr. Mbaga pointed out that the applicant signed an employment contract (EX-A1-Aneex ABL1) and in the said exhibit pg 5 clause 9, requires the employee to follow the laws of the country, banking services regulations and applicable policies of the bank. I have also looked at the provisions of clause 7(b)(d)&(e) and clause 8(3)(a) of the EXA9, disciplinary matters and procedure and Azania Bank Human Resource Policy, it clearly explain the outcome of contravening the rules and regulations, dishonesty and breach of trust. The disciplinary measure therein is termination. There was no denial by the applicant on the awareness of the policies and procedures.

It is trite law that in proving reason for termination of the employee, the yardstick is fairness and not strict proof beyond reasonable doubt. At this point, since the offence that the applicant was terminated with was gross misconduct, the issue is therefore to see whether the same was established by the respondent as required under Section 37 of the ELRA.

In this part, I am satisfied that the substance of the termination was fair because during disciplinary hearing, the respondent proved his case against the applicant as there was sufficient evidence to support termination. The respondent showed how the applicant was involved with the matter by supplying to other colleagues information on the two accounts of customers by making records and establishing mobile banking services without authorization. The EXA11 which is the disciplinary proceeding shows that customer statement was issued; this is the customer whose money was stolen in the account after the applicant conveyed information to people who had ill intention and executed the theft. DW2 explained how the applicant was mentioned to have been involved along with other culprits and that they had been doing that for years. The applicant just denied the allegation and during disciplinary hearing

Further to the above, the other people involved and arrested were not bank officials but on interrogation they admitted that it was the applicant, a bank employer who was cooperating with them by supplying confidential information that enable them to execute the illegal transactions. He was identified by the culprits at the identification parade.

The DW1 also testified that the applicant admitted to have known the culprit who was arrested in Arusha one Noel. The reports were tendered at the CMA including EX10. Therefore on balance of probabilities, the respondent managed to establish the offence against the respondent. In conclusion, the respondent managed to prove those charged hence the termination was substantively fair.

On the procedural fairness of the termination, Mr. Hemedi submitted that during disciplinary hearing, there were no those equipment's that were used for communication like telephone conversations from the applicant and the other accused as they were not tendered. Furthermore, that the person called Noah Mwakalogo, Joshua Mollel and Yusuph Baha and Fitnus Mlelwa who was mentioned to have owned the alleged account at Azania Branch, were not called in the disciplinary meeting and the telephones that were used were also not present at the hearing.

He further referred to the exhibit A-5 which is minutes of the disciplinary hearing which was conducted under Chairmanship of Charles Mugila and concluded on 15/01/2019. He argued that because the key witnesses were never called to explain on the alleged loss of the amount, the meeting did not do justice to the applicant because the offence was not

proved. He supported this argument by citing **Revision Application No. 55/2013 Vs. Rashidi Juma & Another**, whereby Hon Aboud J considered the provisions of the Code on how the disciplinary hearing shall be made. That failure of the employer to bring witnesses denied the applicant's right to examine the witnesses.

Mr. Hemedi went on submitting that at the disciplinary hearing, the Chairman crossed the line by giving an intention to terminate the employment of the applicant (Annex A-6) to the affidavit which reads "intention to terminate your employment" a letter which is signed by the Chairman of the Disciplinary Committee. That after the said letter, the applicant lodged an appeal to the higher authority and the appeal was never heard meaning that he was never called for hearing of an appeal before the appellant authority. That he received a letter of termination on 21/01/2019 on ground that the management confirms the decision of the disciplinary committee.

Mr. Mbaga's reply was that exhibit EXA10 and EXA11 is relevant and the procedure was explained by DW2. That investigation was conducted to see if there was a need to conduct the hearing and EXA4 is the notice to attend disciplinary under Rule 13(2)&(3) of GN No. 42/2007. Also the

applicant had a right to have a representative and he had one called Juma Mkana. He hence argued that the allegation that there is a new charge are unfounded, there were typing errors and they were corrected and he was a witness and the same was received as EXA5.

He submitted further that Disciplinary hearing was conducted, Chairman was impartial and panel well constituted. The applicant was given time to prepare and accorded right to appeal after the conclusion of the hearing. The appeal was lodged on 18/01/2019 and the result came out on 21/01/2019 as is shown in Annex ABL-5 to the counter affidavit. He concluded that the procedures were followed according to the law hence the arbitrator was right to reach the verdict she did. Mr. Hemedi did not make any substantive rejoinder apart from bringing a new issue that the applicant was not paid, an issue which will not be considered as it was never raised before rejoinder.

Coming to the procedural part, Mr. Hemedi is challenging that the termination of the applicant was contrary to Section 37(5) of the ELRA, Cap 366 of RE 2019 which provides that:

"No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto."

Here I think Mr. Hemedi has failed to have the right interpretation of the Section. The key word in this section is ***"being charged with a criminal offence and final determination by the Court".*** The question is whether the applicant was formally charged with the criminal offence. There is no evidence that the applicant was arraigned in court. The only unproved evidence is that the applicant was called at police and he was reporting thereto. With respect, this does not amount to being charged with a criminal offence before a Court of law, therefore the provisions of Section 37(5) cannot be used to challenge the procedure deployed by the respondent herein.

Apart from that, I find the procedure was duly followed, the Disciplinary hearing was conducted. The records also show that the Chairman was impartial and panel constituted according to the HR Manual. There is also evidence that the applicant was given time to prepare and accorded right to appeal after the conclusion of the hearing. He did lodge

the appeal on 18/01/2019 and the result came out on 21/01/2019. This was also Mr. Hemedi's submission, only challenging the fact that the applicant's appeal was not heard, but he was just served with the outcome. Again, one has to be careful of the procedure of appeal following disciplinary hearing and the ones heard in Court where we are required to call parties, give them an opportunity to be heard and make a decision. In disciplinary proceedings, the employee lodged the appeal and the evidence is reviewed, there is no provision that requires an employer to conduct yet another hearing on appeal. Mr. Hemedi's argument does not therefore hold water. On those findings, it is to the satisfaction of this court that the procedures under the Code were adhered to. The termination was hence procedurally fair.

Having made the findings that the termination was fair both substantively and procedurally, the relief of damage cannot be granted. All said and done, the revision beforehand is found to be lacking merits and it is hereby dismissed.

Dated at Dar es Salaam this 29th day of March, 2022.

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S.M. MAGHIMBI
JUDGE